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ABSTRACT

This chapter of "Principles of School Business Management" examines the legal and policy issues associated with racial and ethnic segregation in the schools, including the issues related to forced busing to achieve balance. The chapter first reviews the impact of "Brown v. Board of Education" and subsequent court cases defining the states' and the schools' responsibilities for implementing appropriate desegregation efforts. Arguments and interpretations of the law made by proponents and opponents of busing under forced or free choice conditions are examined. The distinctions between the "de jure" segregation legislated in the South and the "de facto" segregation practiced in the North are clarified and the different remedies considered and mandated by the courts are discussed. The chapter then examines the application of court-ordered remedies in cases involving neighboring districts, whether well established or newly created to impede segregation. The development of government policy on school desegregation and transportation in light of the court's decisions and local and regional responses is described next. The chapter concludes with a review of the essential purposes behind court actions and of the local district factors affecting the acceptability of district decisions. Over 150 footnotes cite court decisions and other relevant references. (PGD)

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School Desegregation and Student Busing

Richard A. King

Development of sound transportation policy requires consideration of many factors. Beyond traditional concerns for adequate, efficient and safe operation, the degree to which school attendance areas and associated bus routes perpetuate patterns of pupil segregation must receive attention from school business administrators. An understanding of law related to discrimination and desegregation is essential for formulating effective transportation policy, as well as for assigning personnel and pupils to schools, constructing and closing school facilities, creating and consolidating school districts and planning and implementing desegregation programs. School personnel must strive to ensure that policies and practices in these areas promote opportunities for educational quality for all students on an "equal" basis.

Board members and educators should recognize the necessity for planning transportation systems as an integral part of the total school experience.[1] In the past half century, school buses enabled students to attend larger, consolidated schools with their broader program offerings and more efficient operation. School buses have also become the primary vehicle for achieving goals of desegregation. Transportation makes it possible for pupils to receive equal opportunities in racially mixed classrooms of paired or clustered schools. Increasingly balanced racial representation among schools or adjacent school districts is possible despite neighborhood residential patterns.

In 1984 the National Education Association (NEA) examined desegregation in the three large school districts of Austin, Charlotte-Mecklenburg and Seattle and reported that busing had been effective in enabling students to attend integrated schools. The report stated that minority students were closing the test score gap, that inequities in facilities and educational resources were largely eliminated and that school and community members had grown in their understanding of people of other races.[2] Moreover, in the nation as a whole, the percentage of black students attending schools with 90 to 100 percent minority enrollment had dropped from 65 to 33 percent between 1968 and 1980.[3]

Nevertheless, busing to achieve racial balance has not been without problems. Cross-district transportation has not consistently been shown to improve achievement levels of minority pupils and is partially blamed for deteriorated education of children in urban school systems. Busing has had such counter-effects as the flight of the middle class from public schools in urban areas and the erosion of public confidence in the ability of schools to integrate successfully.

In contrast to the NEA conclusions are those of a 1984 National Institute of Education analysis of 157 studies on integration and academic achievement.

Cuddy reported that desegregation efforts have not improved black students' achievement in math at all but may have increased reading achievement among blacks by two to six weeks in the year in which integration occurred.[4] He urged improvements in instruction and greater involvement of parents, rather than forced busing, to enhance the education of minorities.

Reports of the effectiveness of desegregation efforts generally, and of busing specifically, have been mixed. If it could be demonstrated conclusively that integration enhanced pupils' education and mutual understanding, then the investment of time and funds for planning and implementing desegregation programs would be cost-effective.[5] Otherwise, societal and school investment in pupil busing to balance racial compositions of schools is unwarranted. Despite the importance of educational and societal benefits and costs of desegregation, this chapter centers its attention on legal mandates and policy issues.

Brown v. Board of Education[6] clearly placed an obligation on states to provide equal educational opportunities in unitary school systems. Desegregation litigation through the 1960s and 1970s provided remedies and incentives to achieve this goal. Busing was often ordered by federal courts to balance racial compositions within districts, but strict interpretation of the Fourteenth Amendment largely frustrated attempts to force consolidation of or pupil transportation between neighboring school districts. As Constitutional interpretations continue to evolve, it is clear that findings of illegal segregation must rest upon proof of discriminatory intent in public officials' actions. Federal administrative pronouncements of the mid-1980s define future directions for America's schools, emphasizing excellence in education as a more pressing concern than that of racially balanced schools.

School business officials must consider federal judicial decisions, legislative actions and administrative directions as they develop recommendations for student transportation, school attendance zones' district boundaries, the construction of new facilities and the abandonment of deteriorated facilities in a nondiscriminatory manner. The myriad legal and policy issues associated with racial and ethnic segregation are the subject of this chapter.

The Mandate to Desegregate Schools

Segregation of pupils by race in America's public schools received judicial support through the first half of the 20th century. For many years, interpretation of the Fourteenth Amendment relied upon the doctrine of "separate but equal." In 1896 the U.S. Supreme Court applied this judicial standard in *Plessy v. Ferguson*[7] to justify segregated railroad carriers in Louisiana. In developing its rationale, the Court referred to the maintenance of separate schools as an illustration of legitimate exercise of police power of state legislatures. The equal protection clause could embrace state statutes requiring "equal but separate accommodations" in public transportation and schools. Ironically, the Fourteenth Amendment was ratified following the Civil War to assure that states' reconstruction statutes would fall within the protections and guarantees of the Constitution.

Of concern to Justice Harlan in his vehement dissent in *Plessy,* and of importance to justices in more recent school desegregation litigation, was the intent of the state's action: "Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by

blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[8] Ultimately, his reasoning that "in respect of civil rights, all citizens are equal before the law" became the Court's interpretation of the Fourteenth Amendment.

The Court upheld segregation of schools by official state action in several subsequent cases involving: 1) demands of blacks to terminate public support of all high schools in Atlanta after the single black high school was closed;[9] 2) the right of a privately chartered college to admit students of both races despite a Kentucky law which mandated segregated schooling;[10] and 3) the classification of a Chinese student as colored and thus assigned to a black school under a Missouri statute.[11] Once several university-level cases opened the door to racially mixed education, the Court revised its position on state-supported segregation.

Several states without professional programs for blacks provided financial assistance for them to attend colleges in neighboring states. In 1935, a Maryland court agreed with a black law school applicant that out-of-state scholarships were insufficient to meet the state's obligation to provide "equal but separate" education.[12] Several years later, the Supreme Court ruled that the availability of universities in adjacent states did not meet Missouri's obligation.[13] While not ordering admission of these students, the way was paved for the desegregation of higher education, particularly given the financial burden of establishing separate colleges within states which had previously relied upon others to accept blacks.

Early in the 1950s, the Supreme Court recognized inequities present in segregated higher education. It examined such "intangibles" as prestige and experience of faculty and administrators and concluded that a Texas black law school was materially inferior.[14] In a companion case, the Court reviewed the treatment of blacks at the racially mixed University of Oklahoma. They found the denial of free access to all sections of the library, classrooms and cafeteria to handicap blacks by restricting opportunities for "intellectual commingling" with fellow students. Black students, concluded the Court, ". . . having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."[15]

In reviewing higher education segregation between 1938 and 1950, the Supreme Court increasingly recognized that interactions among students was an important part of the learning process itself. The "equal" provision of the *Plessy* standard compelled the justices to determine whether separate schooling carried subtle and unquantifiable inequalities.[16] The application of this reasoning to public education at elementary and secondary levels was inevitable.

The unanimous *Brown v. Board of Education* decision stated definitively that public school segregation was a denial of the equal protection clause of the Fourteenth Amendment. State statutes that mandated segregated schooling in Virginia, South Carolina and Delaware, and that permitted separate facilities in Kansas, were declared unconstitutional. Segregated education was "inherently unequal"[17] even when buildings, curriculum, qualifications of faculty and other tangible factors were substantially the same. The Court examined detrimental effects of state-sanctioned segregation and concluded that the denial of benefits available in racially integrated schools slowed black children's educational development.

The mandate to desegregate was emphatic, but justices delayed determination of appropriate relief. They noted that implementation of the edict throughout the nation presented problems of considerable complexity.[18] In its decision the follow-

ing term, the Court placed the burden for interpreting its "nebulous doctrine"[19] on both school districts and federal courts: "School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[20] Similarly undefined timelines directed school officials to make a prompt and reasonable start toward full compliance and lower courts to fashion remedies to permit desegregation with all deliberate speed.

The language of these decisions permitted accommodation and compromise necessary for public officials to effectively dismantle dual school systems. However, the Court's orders also allowed states and schools to postpone desegregation measures. The vague doctrine and time frame contributed to delays and outright noncompliance, especially in the South where there was considerable animosity to the rulings.[21]

De jure segregation— governmentally promulgated and enforced[22] separation of pupils by race—was to be eliminated. Yet the Court did not require affirmative intervention by public officials to integrate schools. On remand from one of the four decisions litigated in *Brown*, a district court judge in South Carolina observed: "The Constitution, in other words, does not require integration. It merely forbids discrimination."[23] This response reinforced beliefs that desegregation and integration were disparate concepts, that affirmative steps were not necessary to dismantle dual systems and that equal education need not be integrated education.[24] Rather than initiate immediate and affirmative steps, subsequent state and school district actions undermined the *Brown* mandate.

Numerous policy options adopted by states and local districts in response to the orders were later declared unconstitutional. These included: 1) ratifying state constitutional amendments or statutes to impede desegregation efforts, such as an Arkansas amendment commanding the state legislature to oppose "in every constitutional manner the unconstitutional desegregation decisions" of the Supreme Court;[25] 2) closing schools serving blacks while keeping others open but denying applications from black children;[26] 3) formulating "minority to majority" transfer policies, whereby students who constituted a minority following reassignment under desegregation plans were permitted to return to their prior school where they were part of the majority;[27] 4) gerrymandering attendance zones, i.e. adjusting geographic areas that prescribe which students attend specific schools;[28] and 5) providing public scholarships and transportation for students attending private segregated academies.[29]

Legislative and school board intent was the primary concern of courts in reviews of these actions. Public schools in Prince Edward County of Virginia, for example, had been closed from 1959 to 1964 by school officials, while state and local funds were available for both races to attend nonsectarian private schools or public schools outside the county. The Supreme Court found segregative intent in school officials' actions, which were taken for one reason only: "to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[30] This use of public funds perpetuated unconstitutional segregation and the Court declared that "the time for mere 'deliberate speed' has run out."

Many states and school districts turned to freedom of choice policies to enable students to voluntarily select which school to attend. In 1968 the effectiveness of

free choice plans was examined in *Green*[31] in light of the intent of state and local policymakers. Despite the stated purpose of the New Kent County school board policy to enable all students to freely choose among schools, the plan was totally ineffective. The Court concluded that the prior dual system continued, as every facet of each school's operation was racially identifiable.

Rather than prohibit educators from implementing any form of choice, the Court held only that using freedom of choice plans was not an end in itself. Free choice, as in the more recent use of magnet schools to attract students from all parts of a district, was permissible if it effectively dismantled dual systems. Freedom of choice alone was not sufficient, and school officials had an affimative duty to identify solutions. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[32]

One year later, the Court again emphasized the obligation of states and local boards "to terminate dual school systems at once and to operate now and hereafter only unitary schools."[33] Fifteen years after *Brown* the Court declared that all deliberate speed was no longer the constitutional standard.

Student Busing to Achieve Racial Balance

Freedom of choice among schools had largely failed and more effective balancing of racial compositions had to occur immediately. Remedies to "cure"[34] past practices of racial discrimination demanded that school boards assert positive policies[35] for assigning pupils to schools. The courts initially turned to student busing to make freedom of choice plans work more effectively. Later, court-ordered pupil assignment and busing would undo effects of past *de jure* segregation.

Transportation was essential to enable students to freely choose among schools. The unavailability of buses in many cases inhibited choice and served to perpetuate dual systems. For example, the failure of an Alabama district to transport black students to schools was declared unconstitutional in 1966.[36] The district court noted that if freedom of choice were to operate effectively, all students must be permitted to apply to any school whether they previously attended the selected school, whether the board agreed they made reasonable choices or whether the board considered transportation reasonably available. A similarly ineffective free choice plan in Arkansas depended upon two separate bus systems that duplicated routes throughout the district. The Eighth Circuit concluded that the school board's operation of racially identifiable buses was designed to perpetuate segregated schools.[37]

Opponents to student busing interpreted the language of the 1964 Civil Rights Act as prohibiting courts from ordering pupil assignment and busing. Desegregation was defined as the placement of pupils without regard to race, color, religion or national origin, provided that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."[38] Even more explicitly, Title IV restricted the power of federal officials and courts from issuing "any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another or one school district to another. . . ."[39]

The Department of Health, Education and Welfare interpreted these so called "anti-busing" provisions as applicable only to those school districts which were

not formerly *de jure* segregated. In *United States v. Jefferson* the Fifth Circuit upheld the HEW interpretation,[40] thus endorsing transportation as a part of free choice plans designed to undo past racial discrimination. The court further stated that percentages listed within Title IV were a general rule of thumb or objective administrative guide[41] for measuring the effectiveness of approved plans. Rather than requiring racial compositions of each school to reflect the population of the entire district, the Act only suggested that fifteen to eighteen percent of the pupil population should be expected to select desegregation schools under a free choice plan.

The following year, a federal court ordered the District of Columbia schools to develop a plan for busing willing black children and to terminate student grouping in inflexible, racially identifiable tracks.[42] The school board could not show that the cost of providing transportation justified its maintenance of overcrowded black schools. In affirming this decision, the Court of Appeals addressed the appropriateness of busing as a remedy when the many contributions to differences in educational opportunities were largely outside the schools' control. It concluded that transportation to level pupil density could be required "when the differentiating factor is as clear as overcrowding versus excess capacity."[43]

Pupil busing as a tool, and mathematical ratios as a standard to shape remedies, were upheld by the Supreme Court in its unanimous *Swann* decision.[44] This 1971 ruling clarified the extent of remedial powers available to federal courts. The nature of a constitutional violation determined the scope of the remedy to be fashioned.[45] Once a court identified vestiges of a dual system, as it had with regard to the Charlotte-Mecklenburg schools, it had great latitude to grant equitable relief. The justices endorsed the following remedies: 1) pairing school attendance zones and redesignating grade structures such that all students in the paired schools would attend both schools for certain grades; 2) clustering several attendance areas with subsequent reassignment of pupils among the schools; 3) busing to transport pupils between paired or clustered attendance areas in noncontiguous parts of the district; 4) reassigning personnel to integrate school faculty and staff; and 5) selecting future school construction sites and schools for closure to aid desegregation efforts.

The Court noted that busing was a "normal and accepted tool of educational policy," as evidenced by its historical importance in the consolidation movement and its prior role in maintaining dual school systems. Once pairing and clustering schools in distant parts of the city were said to be within remedial powers, busing was necessary. "Desegregation plans cannot be limited to the walk-in school."[46]

Maximum feasible desegregation was of essence, but the Court realized that the degree of actual integration depended upon the practicalities[47] of the situation. The Court endorsed busing as a remedy in the companion cases, *Swann* and *Davis*, but did not specify any particular degree of racial balance as a matter of substantive constitutional right. Racial percentages within each school did not have to reflect the composition of the system as a whole.[48] In fact, the continued existence of one-race schools was approved, as long as school authorities ensured that pupil assignments were "genuinely nondiscriminatory." The Court further recognized that communities did not remain demographically stable. Thus, year-by-year adjustments of racial compositions were not necessary once the affirmative duty to desegregate was acomplished and discrimination by official action had been eliminated.

Federal courts avoided imposing absolute quotas in desegregation plans. One-race schools or substantial racial imbalance, as in the case of extremely hazardous road conditions between noncontiguous attendance zones, have not been sufficient evidence of continuing *de jure* segregation.[49] Rather than applying the resulting imbalance as the sole criterion[50] of appropriate movement toward a unitary state, the underlying motivation in decisions of school authorities has been questioned. Courts' findings of *de jure* segregation have depended in large part on a showing of segregative intent in official actions to continue a formerly dual system or to aggravate conditions in states which never mandated segregation.

Desegregating Schools in Northern States

The obligation of formerly *de jure* dual systems to take positive steps to integrate did not initially affect school districts in the North. In contrast to separation of pupils by official state action, it was claimed that *de facto* segregation had resulted from actions of public or private agencies taken without the intent to discriminate, or from practices which had developed through customs and traditions. For example, in *Bell* the Seventh Circuit ruled that Gary, Indiana, school officials were not obligated "to change innocently arrived at school attendance districts" when increases and decreases in percentages of minorities reflected a shifting urban population.[51] Similarly, in *Deal* there was no duty to bus Cincinnati school children out of their neighborhoods for the sole purpose of alleviating racial imbalance.[52] The Supreme Court denied review of these early Northern decisions.

The tradition of neighborhood schools has been the paramount issue in desegregating Northern school systems. Despite the enhanced racial balance, critics claimed that busing endangered children's liberty and privacy interests, directed school resources from other educational goals and jeopardized parental involvement in schools. Benefits of neighborhood school policies included minimizing safety hazards for children who were able to walk or ride short distances, easing pupil placement through use of neutral, easily determined criteria, promoting better home-school communication and reducing costs of transportation and administration. Carter, a federal court judge, commented that concepts of local control and neighborhood attendance areas were so ingrained that total elimination of *de facto* separation would require "a revolutionary approach to school organization that is fiercely resisted."[53]

School boards and courts held to the ruling of the Fifth Circuit's interpretation of the previously referred to provisions of the Civil Rights Act. Busing as a remedy was limited to findings of illegal *de jure* segregation and could not be ordered in school systems based on bona fide neighborhood schools.[54] The federal courts reasoned in *Bell* and *Deal* that if the Board of Education had not caused racial imbalance, there was no constitutional duty to transfer pupils or to select school sites solely to alleviate that imbalance. School system attendance policies based upon "honestly and conscientiously constructed"[55] neighborhood school plans with no intention to segregate racial or ethnic groups were immune from court-ordered remedies. The courts placed a difficult-to-meet standard upon plaintiffs in Northern states to "expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice."[56]

Housing patterns reflective of long standing customs and racial attitudes contributed substantially to school segregation. It was left to the federal courts to isolate the contribution of school board policies to segregation among neighborhoods and schools. The Seventh Circuit in 1968, for example, found an Illinois district to have discriminated in the assignment of teachers, selection of school sites and transportation of pupils. The district court order to bus pupils was valid within the Civil Rights Act. "This was done not to achieve racial balance, although that may be the result, but counteract the legacy left by the Board's history of discrimination."[57]

A 1970 New York decision illustrated that segregative actions by public officials in Northern states were an unconstitutional form of *de jure* segregation. A federal district court struck down a state law that prohibited assigning students, or establishing, reorganizing or maintaining school districts or attendance areas, for the purpose of achieving racial balance.[58] The stated legislative intent was to promote local control and to assure community acceptance of desegregation methods. The court responded, however, that the state failed to show that their purpose could not have been accomplished by alternate methods not involving racial distinctions.[59]

In 1973 the Supreme Court examined the discriminatory intent of school officials in Colorado, a state that had not at any time legislated separate schools.[60] The "purpose of intent to segregate" distinguished *de facto* from *de jure* segregation in the view of the Court in the *Keyes* decision. Plaintiffs[61] had to establish not only that segregated schooling existed in Denver, but also that it was brought about or maintained by intentional state action.

The district court had concluded in 1969 that the location of a new elementary school with "conscious knowledge" that it would be segregated, gerrymandered attendance zones to "aggravate and intensify the containment" of blacks, and the excessive use of mobile classrooms evidenced deliberate segregation.[62] It directed the Board to desegregate schools in one part of Denver, since the confinement of purposeful segregation in a single section of the city did not impose an affirmative duty to desegregate the entire school district. On appeal, the Supreme Court reversed this conclusion, stating that plaintiffs did not have to prove the "elements of *de jure* segregation as to each and every school or each and every student within the school system."[63] Evidence of intentional segregation in part of a system "is not devoid of probative value in assessing school authorities' intent" in the remainder. The Court had paved the way for system-wide remedies in the North.

In 1975 the First Circuit upheld pupil transportation in Boston to remedy segregation that had been perpetuated by "knowing and purposeful actions" of school authorities.[64] The desegregation plan proposed by the board permitted freedom of choice among schools and involved students in weekly integrated activities. The court rejected these limited approaches, as well as claims that the Equal Educational Opportunity Act of 1974 disallowed court-imposed busing until all appeals had been exhausted. Similar to the Fifth Circuit's response to the anti-busing provisions of the Civil Rights Act in *Jefferson*, this Court of Appeals held that the 1974 Act did not "affect counterefforts to eradicate *de jure* segregation."[65]

System-wide solutions were appropriate when it was shown that school boards could foresee potential effects of their actions on both school and residential segregation. In finding the Columbus and Dayton school boards to have ignored their affirmative duty to desegregate the dual systems that were in operation at the time of *Brown*, the High Court discussed relationships between school board decisions

and racial compositions of neighborhoods. In *Columbus*, the Court found that school officials had initially caused and, after 1954, intentionally aggravated the isolation of an enclave of black schools on the east side of Columbus. It upheld a system-wide remedy, since actions having "forseeable and anticipated disparate impact"[66] were relevant in proving a forbidden purpose and encouraged the board to act with an integrative influence on residential areas. In 1985 the district court judge relinquished control over the desegregation plan, stating that Columbus was probably the most desegregated system in the nation.[67]

Similar underlying motivations and resultant effects of board decisions were upheld as circumstantial evidence in *Dayton*.[68] The district court had initially ordered a system-wide remedy to assure each school would reflect the racial mix of the entire district. The Supreme Court overturned this ruling as unjustifiably broad and established a new standard of "incremental segregative effect" for determining the appropriateness of a system-wide remedy. In essence, federal courts would have to show that there was an incremental effect of each constitutional violation on the racial composition of the total system.[69] On remand, the district court upheld the school board since neither racial imbalance, nor the policy of maintaining neighborhood schools, violated the equal protection clause.[70] This decision was reversed by the Sixth Circuit, based upon its finding of intentional segregative impact that "infected the entire Dayton public school system."[71] The Supreme Court agreed that foreseeable consequences of student and faculty assignment, continued use of optional attendance zones, school site selection and grade level structures of schools evidenced an impermissible intent and upheld the appropriateness of a system-wide remedy.[72]

More recently, the Ninth Circuit concluded that the cumulative impact of a California school board's policy decisions demonstrated clear segregative intent.[73] The board had not implemented state department suggestions for desegregating schools despite prior agreements to do so. It assigned faculty and staff on the basis of race and ethnicity, transported one third of the students but refused to bus to achieve integration, instituted double sessions to relieve overcrowded schools departed from its neighborhood plan to avoid transferring Anglo students to predominantly Hispanic schools and closed schools, located portable buildings and selected new sites in a manner to maintain ethnic imbalance. While many alternate policies could have contributed incrementally toward reduced imbalance, the court observed that in almost every instance, the board chose to "turn toward segregation" rather than away from it.[74]

Segregative intent also justified the Supreme Court's negation of citizens' decisions to limit pupil busing in *Seattle*.[75] Two thirds of Washington voters had approved a state constitutional amendment that would prohibit busing for purposes of improving racial balance but would permit pupil transportation for certain other purposes (e.g., special education, overcrowding, health and safety). Immediately affected were three districts, including Seattle, which had begun voluntary busing between attendance areas. These districts challenged the state-wide initiative, claiming a violation of the Fourteenth Amendment.

The trial court found the Seattle Plan to be particularly effective, as it had substantially reduced the number of racially imbalanced schools and the percentage of minority students in those schools with continued high imbalance.[76] Voters were aware that greater imbalance among schools would result, and the court concluded that a racially discriminatory purpose motivated conception and adoption of the

initiative. In striking down the amendment, the district court cited its racially disproportionate impact and the sequence of events leading to its adoption."

The Supreme Court affirmed these findings and agreed that the initiative prohibited busing for racial reasons only. The justices examined this impermissible racial classification in its relation to local boards' discretion in educational matters. The initiative placed power over desegregation and busing at the state level, thus differentiating the treatment of problems involving racial matters from other similar issues.[78]

The federal courts had established a clear standard that mandatory busing could be imposed only if *de jure* segregation was proved. Neighborhood school policies were permissible, provided that racial imbalance among schools was not the result of intentional discriminatory acts of school boards. Proving discriminatory intent was, however, a difficult task given instabilities in communities' racial composition. While *Keyes* had paved the way in the early 1970s for similar suits in Northern states, a heavy burden to prove intent was placed on plaintiffs.

One year after *Keyes*, for example, the Sixth Circuit affirmed a trial court's findings that segregation in the Grand Rapids schools had resulted from decisions of other public agencies and individual housing choices, rather than from segregative intent in neighborhood policies and facility construction.[79] Furthermore, the court stated that any reciprocal effect between segregated schools and residential patterns could not support a finding of *de jure* segregation on the part of school officials.

In 1976 the Supreme Court examined causes of annual fluctuations in racial compositions of Pasadena, California, schools and concluded that imbalances were largely outside the school board's control.[80] A district court had previously imposed a rigid standard that there could be no school "with a majority of any minority students."[81] Compliance had occurred only during the first year under the plan, and the district court in 1974 reiterated that the requirement was to be applied each year even though annual changes in the racial mix in schools were caused by external residential patterns.[82]

In reversing this standard, the High Court stated that the lower court had exceeded its authority. Shifts in the racial makeup of Pasadena schools reflected the normal pattern of people randomly moving into, out of and around the school system and could not be attributed to any segregative actions of school officials. The *Swann* standard was thus applied to Northern schools: Annual adjustments in schools' racial compositions were not essential once the affirmative duty to desegregate had been satisfied.

School boards that were otherwise innocent of segregative intent were not held liable for discriminatory housing practices of other public and private agencies. The Sixth Circuit used this reasoning in 1982 to affirm a lower court's dismissal of charges against the Youngstown and Akron public schools.[83] Plaintiffs were unable to demonstrate that discrimination was the motivating factor in past actions of either board. Imbalance reflected housing patterns, and to hold school officials responsible for racially isolated neighborhoods would place "too heavy a burden on the schools to remedy wrongs for which they are no more or less responsible than the plaintiffs, the courts, the churches, the Congress or other institutions."[84]

Neighborhood school policies were upheld by the Supreme Court in *Crawford*,[85] the 1982 companion case to *Seattle*. As in the state of Washington, an anti-busing proposition was ratified by California voters in 1979. This constitutional amend-

ment prevented state courts from ordering pupil assignment or transportation "unless a federal court would be permitted under federal decisional law to impose that obligation" to remedy a violation of the Fourteenth Amendment. A state court denied a request by Los Angeles schools to end a previously ordered desegregation plan, holding that the proposition did not apply given its prior finding of *de jure* segregation. However, the California Court of Appeal found insufficient proof of intentional segregation and reversed the trial court's decision.[86]

Unlike its finding of discriminatory intent in *Seattle*, the Supreme Court upheld this California proposition and the ability of a state's voters to rescind remedies that exceed those which would be ordered for constitutional violations. The *Crawford* decision was based in part on states' authority to develop policy. An interpretation of the Fourteenth Amendment to restrict abilities of states to rescind such actions would be destructive to states' democratic processes and of their ability to experiment.[87] The court noted that school districts themselves remained free to adopt reassignment and busing plans.

Furthermore, California voters were not found to have been motivated by discriminatory purposes as was shown in *Seattle*. The proposition itself had legitimate, nondiscriminatory objectives and did not embody, expressly or implicitly, racial classification. "The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards."[88] The Court held that when such a neutral policy as maintaining neighborhood schools has a disparate effect on minority groups, discriminatory intent must be proved in order to substantiate a Fourteenth Amendment violation. In a long dissenting opinion, Justice Marshall viewed the majority's decision as allowing "placement of yet another burden in the path of those seeking to counter the effects of nearly three centuries of racial prejudice."[89]

Several trends appeared in Northern desegregation cases. What was believed to be *de facto* segregation was often found to be caused by school board actions. This intentional *de jure* segregation could be remedied by system-wide pupil transportation. Nevertheless, plaintiffs had to prove discriminatory intent in decisions which caused incremental segregative effects. In many cases federal courts denied relief, since actions of other public and private agencies and housing decisions by individuals had for the most part resulted in residential and school segregation.

The recent *Crawford* decision evidenced another trend in attitudes of many educators, courts and federal administrative officials. Voters' rejection of busing reflected long standing beliefs that forced, pupil assignment diminished equal educational opportunities and that "integration is bad education."[90] Similar views of the federal administration, discussed later in this chapter, suggested a movement in the 1980s toward enhanced educational quality for all children regardless of racial balance.

Interdistrict Remedies

Public officials' actions have often affected pupil segregation in more than one school district. As with other efforts to resist the *Brown* mandate, states permitted formerly dual systems to divide, creating separate legal entities. More recently, independent districts have opposed interdistrict busing and consolidation. In each

of these instances, segregative intent has played an important role in federal courts' determination of the appropriateness of multi-district remedies.

In 1972 the Supreme Court examined attempts to partition Southern school districts to isolate racial populations. In *Scotland Neck*, a North Carolina city school district severed itself from a largely black county system.[91] The county board was in the process of dismantling the former dual system, and the city feared substantial white flight if an independent district were not formed. The Fourth Circuit upheld the division of the county as a legitimate action of the state legislature to define boundaries of local governmental units.[92] In its reversal the High Court cited *Swann*: "If a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct . . . the dis-establishment of a dual system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."[93] Furthermore, the Court stated that white flight could not be accepted "as a reason for achieving anything less than complete uprooting of the dual public school system."[94]

Similarly, a Virginia city's schools separated from a county system after a court-ordered desegregation plan replaced an ineffective free choice policy. The Supreme Court prevented this reorganization in *Wright*, as the ultimate effect would have been to exacerbate the racial imbalance. The underlying motivation of school officials was evident. "Only when it became clear—15 years after our decision in *Brown*—that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system."[95]

Federal courts' investigations in such cases depended upon the likelihood of increased racial imbalance between partitioned districts, segregation trends in other city school systems in the state and the timing of a division in relation to other desegregation efforts.[96] If creating new school districts continued or intensified racial separation, then state or local officials had violated their affirmative constitutional duty to end *de jure* segregation.

A higher concentration of minority students is generally found in cities, and more effective desegregation of urban schools in many cases would be achieved through interdistrict cooperation. Nevertheless, busing across district lines was a remedy available to courts only when *de jure* segregation was proved. The 1966 interpretation of the Civil Rights Act by the Fifth Circuit[97] permitted court-ordered interdistrict busing, if racially motivated actions of one or more districts ultimately affected segregation in other school systems.

Unlike the obvious discriminatory motivation in the *Scotland Neck* and *Wright* partitions of existing county systems, it was more difficult to prove discriminatory intent in a school board's desire to maintain historical boundaries. A New Jersey district's lines, for example, were upheld in 1971 under a reasonableness standard. The affirmative duty to integrate did not extend beyond long-standing boundaries. "If the drawing of district lines is reasonable and not intended to foster segregation, then that action satisfies the mandate of *Brown*. It cannot be said that school district lines based on municipal boundaries are unreasonable."[98]

Similar reasoning led to the Fourth Circuit's reversal of a 1972 court order[99] to merge Richmond with two suburban school districts. A greater degree of integration would have occurred under a metropolitan plan, but the Court of Appeals found no evidence that the boundaries were drawn originally or maintained over the years to perpetuate racial separation.[100] Rather than invidous state action intended to circumvent protected rights, it was other economic, political and social

reasons which accounted for the schools' racial compositions. In the view of the Fourth Circuit, the adjacent counties could not realistically bear responsibility for school-related effects of inner city decay.

The Supreme Court reviewed similar claims of multi-district violations affecting Detroit schools in 1974.[101] It denied an interdistrict remedy but stated that federal courts could bridge district lines, if local boards' decisions conflicted with the Fourteenth Amendment. Lower courts had previously determined that desegregation of Detroit schools would be impossible without including the entire metropolitan area. Since school district boundaries themselves contributed to racial segregation, the district court ordered student busing between Detroit and its fifty-three suburban school districts. The Supreme Court reversed this directive in its often cited *Milliken v. Bradley* decision as a wholly impermissible remedy. The Court upheld local control of schools' operation and declared that district boundaries could not be treated as simple matters of political convenience.

Discriminatory intent had not been shown on the part of suburban districts, and thus their racial compositions could not be considered in formulating a decree. "[T]he constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county or school district as compared with neighboring areas."[102] Interdistrict remedies only applied when racially discriminatory actions of the state or local districts were a substantial cause of interdistrict segregation, such as when district boundaries had been drawn deliberately on the basis of race or when a constitutional violation within one district produced a significant segregative effect on other districts.

In 1981 the Fifth Circuit applied *Milliken* to determine whether transfer programs that were instituted initially to maintain racial segregation between neighboring districts could lay the basis for interdistrict remedies. It concluded that present segregation had not substantially resulted from an Alabama district's transfer policy, and that interdistrict remedies applied only if "it is established that these transfer programs have a substantial, direct and *current* segregative effect."[103] Otherwise, school district lines were to be carefully observed.

This court also recognized substantial segregative effects related to transfer provisions and geographically overlapping attendance zones between two Louisiana school districts. Nevertheless, it upheld a lower court's denial of an interdistrict remedy,[104] as only "limited" constitutional violations had occurred. In absence of evidence of discriminatory intent in these policies, the court formulated an intradistrict solution that eliminated the overlapping zones and transfer option. The Fifth Circuit affirmed this confinement of school systems to respective boundaries stating, "*Milliken* teaches that interdistrict violation and interdistrict effect together must support interdistrict remedy."[105]

Federal courts have examined segregative intent in school districts' resistance to merge within larger political subdivisions. In *Indianapolis*, the Seventh Circuit agreed with legislative expansion of the city to include all of Marion County without requiring concurrent extension of the urban school district.[106] In all prior instances in Indiana, expansion of both political boundaries occurred simultaneously.

In 1973 a district court found a purposeful pattern of racial discrimination within the city schools. Believing that accelerated white flight would impede desegregation of urban schools under an "Indianapolis only plan," it ordered the state to

prepare a metropolitan plan to include school districts beyond the city (and county) limits. This order requested either consolidation or pupil transfers to vindicate the right of black students to attend nonracially identifiable schools.[107] The Seventh Circuit based its 1974 reversal on *Milliken*, holding that adjoining districts had not committed any acts of *de jure* segregation within their respective borders or directed at the city system.[108] The district court then limited its order to busing black students from the city to the eight school districts within the recently expanded municipality.[109] The Supreme Court set aside this order and required a demonstration of discriminatory intent on the part of those districts within Marion county.[110]

In 1978 the Seventh Circuit asked the district court to examine whether discriminatory purposes were evident in decisions to expand the municipal boundary without concurrent extension of the school district and to restrict public housing to the original city limits.[111] Actions of the housing authority as approved by the County Development Commission demonstrated segregative intent, but county school districts had not engaged in discriminatory acts affecting the city schools. The district court thus designed a remedy to redress only the difference between the existing racial distribution and what it would have been without the limited constitutional violations.[112] While black students were bused to the eight suburban districts within the expanded municipality, school district lines were not extended.

In *Goldsboro*, the city board of education claimed that the county board's refusal to consolidate had perpetuated a racially discriminatory structure of public education. The Fourth Circuit agreed with the trial court's conclusion that the county's resistance to merger was logical, legitimate and nondiscriminatory. As in *Milliken* and *Indianapolis*, there was no interdistrict effect: "An independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial balance in the other."[113]

A 1980 attempt to implicate districts surrounding Houston failed, and in 1982 the Fifth Circuit ruled that good faith efforts had desegregated city schools as effectively as could be expected.[114] A 1957 order eliminated overlapping attendance zones of the prior dual system, and the school board subsequently implemented voluntary transfers, paired elementary schools and magnet schools. In 1979 a district court ordered the Texas Education Agency to develop a Voluntary Interdistrict Education Plan to transfer Houston students to schools in Harris County. One year later the court denied a request for a more extensive interdistrict solution, since suburban districts had not caused substantial disparities in racial compositions.

The Fifth Circuit agreed that the substantial minority enrollment resulted from recent population shifts and held that further integration efforts within Houston to eliminate several one-race schools would be "impractical and detrimental to education."[115] If the racial composition were spread evenly throughout the district, over 70 percent of each school's enrollment would be black or Hispanic. Despite the rapidly expanding minority population within the city and the presence of "racially stratified" suburban schools, an interdistrict remedy was not ordered.

The trend evident in these decisions is the difficulty of proving discriminatory intent in public officials' actions that may promote segregation between an urban center and its surrounding school districts. Nevertheless, interdistrict remedies have been ordered or have occurred voluntarily under threat of litigation in many metropolitan areas. Busing between and consolidation of school districts have been the principal remedies available to federal courts when clear discriminatory intent

to maintain segregated systems is demonstrated on the part of state or local public officials. Interdistrict remedies have been sustained on appeal when the solutions matched the scope of *de jure* segregation existing among school districts.[116]

The 1937 creation and subsequent exclusions of an all-black school district from consolidation proposals within St. Louis County, for example, were unconstitutional actions of the state of Missouri. In 1975 the Eighth Circuit cited the Supreme Court's pronouncement in *Milliken*—that drawing district lines on the basis of race could evidence illegal intent—to uphold the consolidation of three adjacent school districts.[117]

In other litigation involving school districts in St. Louis County, the courts ordered the development of a desegregation plan for the city schools and the voluntary transfer of pupils between urban and suburban districts.[118] In 1983 suburban districts agreed to pupil transfers in return for a promise by the city schools and the NAACP to discontinue litigation that might have resulted in merger. In approving the metropolitan plan, the judge found the state to be a primary constitutional violator in causing school segregation and commented that state policy must yield when it hinders vindication of constitutional guarantees. He ordered the state to fund voluntary interdistrict transfers and to share with the city board costs of magnet schools and other programs to strengthen the quality of urban schools.[119]

In the mid 1970s the Sixth Circuit upheld consolidation of the Louisville city and surrounding Jefferson County schools.[120] Unlike the Detroit situation in *Milliken*, school officials had exacerbated segregation by ignoring district lines. They were "crossed for the purpose and with the actual effect of segregating school children among the public schools of the county,"[121] enabling the continued operation of dual school systems. The interdistrict remedy removed these artificial impediments to effective desegregation of the county's schools.

Wilmington, Delaware, schools were also merged with surrounding districts. Interdependence between the city and suburban school districts existed for many years, beginning with Wilmington's operation of the only black school in the metropolitan area. Following *Brown*, state-subsidized transportation for city children to attend private schools in the suburbs perpetuated segregation. The district court held that actions of school officials throughout New Castle County, and provisions of Delaware's Educational Advancement Act that excluded Wilmington schools from eligibility for reorganization, caused significant interdistrict effects. Resulting segregation was a cooperative venture, with external public agencies contributing substantially to racial segregation in and around Wilmington, and the judge ordered merger of the city and surrounding school districts.[122] Disparities in racial composition were not the constitutional violation, but served as a signal of the continued dual system. The fact that birth rates and shifting population also contributed to imbalance did not relieve the state from its duty to desegregate.

Under the metropolitan plan, the court defined a desegregated school as one in which enrollments in each grade ranged between 10 and 35 percent minority. While the plan itself was affirmed on appeal, the Third Circuit rejected this criterion.[123] Fixed requirements were inconsistent with the Equal Educational Opportunity Act of 1974, which stated clearly that no particular balance was to be required in any school, grade or classroom.[124] Ultimately, a reorganized school district encompassed the metropolitan area.

A similar long history of segregation in the Little Rock metropolitan area culminated in a 1984 court order to merge the city schools with two suburban school

districts. Prior to *Brown*, the urban district maintained the county's only accredited black high school, reflecting and reinforcing the concentration of minorities in the city. In 1956, the governor directed National Guardsmen to prevent black students from entering the desegregated high school. The following year the Supreme Court declared a state "pupil assignment law" that eased compulsory attendance requirements at racially mixed schools to be an impediment to desegregation.[125] The governor then closed all Little Rock high schools for the 1958-59 school year; this action was later found to be unconstitutional.[126] Desegregation proceeded slowly during the 1960s. White flight and a higher birth rate among blacks contributed to an increased concentration of minorities in the city schools. Black enrollment grew rapidly from 48 to 70 percent of the total between 1973-74 and 1983-84. In contrast, the suburban Pulaski County and North Little Rock school districts enrolled 22 and 36 percent minority students respectively in 1983.[127]In reviewing these disparities in enrollment, the district court examined the degree of interdistrict cooperation. Voluntary transfers and extension of city school district boundaries exacerbated segregation. While several attempts to consolidate had failed, cooperative instructional planning continued. The judge concluded that the schools were not separate and autonomous, and that the county district's behavior—its deannexations of land and refusal to consolidate—evidenced unconstitutional racial motives and significant interdistrict effects.[128]

Acts of other governmental agencies contributed to Little Rock residential segregation and, thus, to disparities in schools' racial compositions. Racially identifiable neighborhoods resulted from locating housing projects, "steering" potential home buyers to certain neighborhoods and allocating mortgage funds on a discriminatory basis. The judge observed that many governmental bodies "acting in concert with one another,"[129] and not solely individualized private housing choices, had caused patterns of residential and school segregation. Findings of discriminatory intent in actions of the two suburban school districts, the state and various other public and private agencies justified an interdistrict remedy. The judge ordered merger of the three districts and student busing to achieve a racial balance in schools within 25 percentage points of the composition of the total consolidated district.

These multi-district rulings indicate that, if segregative intent could be proved on the part of school district officials or other governmental agencies to have affected racial balance among school districts, then interdistrict busing or merger could be ordered. However, the strict standard established in *Milliken*, and the general reluctance of federal courts to subject autonomous school districts to interdistrict solutions, have largely frustrated attempts to impose these remedies.

Legislative and Executive Policy Development

Observers of desegregation decisions and resulting changes in practice agree that courts have not inspired reform in state and school policy with all deliberate speed. Progress has been made slowly, with constitutional interpretations changing more rapidly than schools.[130] Nevertheless, local boards and state and federal legislatures initiated policy to attain goals of desegregation and equal educational opportunity during the 1960s and 1970s.

The Civil Rights Act of 1964—enacted a full decade after *Brown*—has often been referred to as the greatest single blow to desegregation resistance. Title VI banned discrimination on the basis of race or national origin in federally assisted educational programs. More important in furthering desegregation efforts, the Act authorized the Department of Health, Education and Welfare to provide federal assistance for planning programs and training personnel, and to withhold funds for programs found to discriminate. It also empowered the U.S. Justice Department to file suits based upon complaints of private citizens.[131]

Subsequent enactment of many programs to promote equal educational opportunities—such as the Elementary and Secondary Education Act (ESEA) of 1965, the Emergency School Assistance Act (ESAA) of 1971, and the Equal Educational Opportunity Act of 1974—provided both needed funds for and federal commitment to the desegregation of America's schools. The strength of national priorities during these years yielded vastly increased federal and state financial assistance. Local school program planners eagerly accepted the funds, and district boards avoided potential punishments including withdrawal of funds and lawsuits to force compliance.

Despite substantial progress made toward improved education in racially balanced schools, the nation's leadership and governmental priorities shifted before these goals were fully accomplished. The National Education Association observed that the federal administration in the early 1980s backed by "well organized and powerfully regressive political forces," gave top priority to erasing school desegregation and civil rights advancement from the national agenda.[132] In the view of many critics, the "new federalism" espoused by the national government was the "ideological antithesis" of the social revolution of the late 1960s.[133]

In contrast to the categorical programs, were the 1981 Educational Consolidation and Improvement Act (ECIA) and concurrent stated directions for federal policy. The block grant approach of ECIA's Chapter II directed decision-making authority to states and school districts so that they might better respond to local priorities. The Acting Secretary of Education, in presenting the recommended Department of Education budget for the 1986 fiscal year, stated, "A number of currently funded categorical educational programs have either achieved their objectives, can be funded from other sources or do not otherwise require Federal involvement."[134] In addition to ten programs terminated in 1985, were another twenty-eight programs scheduled for elimination in 1986. Many of these programs would be eligible for continued funding under Chapter II block grants, if local boards wanted it.

This transference of program control does not suggest that education was perceived as less important at the federal level in the 1980s. Indeed, America's awakening to the condition of public elementary and secondary schooling through various reports[135] immersed federal and state legislative and educational agencies in yet another public policy revolution. Still, the emphasis of educational reform activities tended to divert attention from goals of equal educational opportunity to goals of excellence in education.

These national policy directives expressed through budget recommendations were consistent with statements by administrative officials. Observing that mandatory busing and racial quotas had failed to elicit public support and did not advance the overriding goal of equal educational opportunity, the administration declared

in 1981 that it would promote only voluntary desegregation efforts.[136] Similarly, the Assistant U.S. Attorney General stated in 1984 that mandatory busing had clearly been counterproductive and should not be used in public schools in the future. He described the policy direction as an "inevitable aftermath of well-intentioned but mistaken social experimentation, most notably with quotas in affirmative action and with court-ordered busing for school desegregation."[137] Rather than mandatory pupil busing, "acceptable" remedies included voluntary student transfers, magnet schools, modest adjustments in attendance zones, enhanced curriculum requirements and improved training for teachers. Attempts to limit the Justice and Education departments' abilities to enforce desegregation plans involving busing have ranged from proposed constitutional amendments to riders on appropriation bills. The proposed Public School Civil Rights Act of 1985, for example, would have barred federal district and circuit courts from ordering busing for desegregation purposes.

School officials as well as black parents in many urban areas expressed agreement in the 1980s that it was as important to improve educational quality as to achieve racial balance. Rather than concentrate on attaining integration goals measured by racial balance and often achieved only by busing, efforts in cities addressed goals of effective education. Black leaders in many cities favored policies that promised more involvement in policy making, more equitable distribution of educational resources and application of research findings to ensure effective black schools.[138] For example, during the *Crawford* litigation, black and Hispanic leaders spoke against busing and called for quality education and community decision-making instead.[139] An attorney for the NAACP Legal Defense Fund indicated similar acceptance of shifting goals: "While ending racially isolated schools is crucial, quality education is a second choice, a settlement for whatever can be done to improve the quality of schooling for segregated minority children.[140]

More than racial balance is required to provide equal educational opportunity. Pupil assignment plans and court-ordered busing were important remedies in the 1970s as visible efforts to end *de jure* segregation. In the first several decades following *Brown*, it was assumed that racially balanced schools would provide minority children an equal opportunity for a superior education. Policy development in the 1980s centered on other approaches to this goal. With less concern for ratios per se and more attention on improved education for all students, the ideals stated in *Brown* might finally be attained.

Conclusions and Implications

School desegregation decisions and policy directions greatly affect the operation of public schools and the roles of school business officials. No longer do school managers proceed carelessly in areas of decision making that may result in unfair or arbitrary treatment of individuals or groups of employees or students. Actions of school boards and administrators are subject to close scrutiny when the equal protection clause, or a state or federal statute guaranteeing nondiscriminatory treatment may be implicated.

The Fourteenth Amendment to the Constitution at a first glance is quite clear. No persons, including students in public schools, may be denied their rights to fair and equal treatment. All persons are not, however, entitled to absolute equality

with regard to services and benefits of public agencies. The amendment merely protects them from irrational treatment and unnecessary discrimination.[141] All state responsibilities must be exercised consistently with constitutional guarantees; this has been particularly true in courts' review of segregative policies and practices.

Actions to delay the *Brown* order to dismantle dual systems with all deliberate speed resulted in court-ordered remedial steps including pupil busing to balance racial compositions. The duty to end discriminatory policy and practice has been clear whether school boards once operated state-mandated dual systems or were shown to have intentionally discriminated in their official capacity. In reviewing district operations, courts are concerned with both the degree to which public officials' actions evidence an intent to segregate and the resulting effects of those decisions on schools' racial compositions. School officials' motivations in policy development may be quite legitimate, but the actions themselves may contribute to illegal discrimination. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[142] Public school administrators must behave in ways to mitigate charges of purposeful discriminatory treatment and must take precautions to reverse segregative effects of school policy.

The adoption of policies and practices that will knowingly exacerbate pupil segregation is a primary indicator of impermissible motivation. It is a constitutional violation for school personnel to intentionally transport students, assign personnel and construct new schools in such a manner as to increase racial separation. The courts have stated repeatedly that actions taken with purposeful discriminatory intent violate the equal protection clause, resulting in imposition of affirmative remedial steps. On the other hand, if transferring pupils among schools of differing racial and ethnic compositions, altering attendance zones and creating magnet schools with unique programs to attract pupils from many neighborhoods and reorganizing grade levels and schools within or among districts positively contribute to desegregation, then remaining racial imbalance is not likely to trigger remedial measures.

Courts have encouraged flexibility and creativity in policy making. School officials must accept the challenge to develop realistic and effective responses to directives from courts, legislatures and other governmental agencies. Solutions are implemented most successfully when school personnel and board members involve students, parents and attorneys in policy development. Inviting groups who are most directly affected by desegregation decisions to contribute ideas and seeking the advise of legal counsel in all stages of policy formulation should mitigate potential litigation once changes in school operations are implemented.

Ineffective policies must be examined carefully and, if necessary, be revised to demonstrate good faith efforts to achieve as great a degree of racial mix as possible. Freedom of choice plans of the 1960s were, for example, only superficial responses to *Brown*. The effectiveness, rather than the concept, of free choice was questioned. Successful open enrollment plans, voluntary transfers and magnet schools illustrate that free movement of pupils among neighborhoods is allowable to reduce isolation of racial and ethnic groups.

While racial balance is a goal, the practicalities of district geography and other conditions often dictate the maintenance of substantially one-race schools. The Supreme Court has not upheld lower courts' imposition of particular racial balances in schools, grades or classrooms. Percentages merely serve as a starting

int for formulating remedies and for determining the effectiveness of desegregation plans. The primary concern of courts is the pattern of decisions rendered by the board to affect the distribution of racial groups throughout the system, rather than the balance attained.

Neighborhood school policies often run counter to districts' efforts to balance racial compositions. Nevertheless, the strong tradition of neighborhood schools, as well as disadvantages of busing in terms of disrupted education and increased operational expenses, argue against elaborate transportation plans. Busing is an extraordinary remedy available to courts only when appreciable results are anticipated and when other alternatives have been exhausted.[143]

Bona fide neighborhood school policies can be maintained. However, when school boards have drawn attendance zones with purposeful segregative intent, busing may be ordered as a remedy. Furthermore, busing for other purposes, e.g. relieving overcrowded schools of consolidating special education programs, may provide proof of differential treatment. This reasoning contributed to recent findings of discriminatory intent when the Supreme Court reversed the Washington anti-busing initiative,[144] and when the Ninth Circuit found one-third of San Jose pupils to be bused for reasons other than to integrate schools.[145]

Desegregation plans are costly to school districts. The obvious expenses of purchasing buses and hiring additional drivers are compounded by increased costs for mapping attendance zones, meeting with varied community groups and orienting school staff. Planning and implementing extensive student busing to integrate schools intensify problems inherent in school business administration and strain educational resources. Yet, the inconvenience of desegregation plans, the burden of remedies on pupils and employees and the expense of implementation are insufficient defenses against the failure to undo past discriminatory actions.

The cost of implementing a proposed plan[146] depends upon the number of students to be transported, the time period over which the plan is to be phased in and the number of buses to be added. Additional expenses for housing and maintaining the expanded fleet, and for salaries, training and supervision must be anticipated. Costs of effective transportation plans may vary greatly over time as shifting demographics and changing educational programs alter attendance areas and bus routes. Flexible transportation policies should avert claims of intentionally segregated schools maintained through rigid attendance zones. Periodic and systematic assessment of transportation policy is an essential element of broader planning cycles.[147] District planners must review community and school demographics regularly to identify economic and racial group isolation reflective of school attendance and transportation policies.

The selection and training of school bus drivers are important components of transportation management. Care should be taken to assign those drivers who are most supportive of busing as a means to achieve equal educational opportunities to routes between attendance areas. In addition to providing training programs on the safe operation of vehicles, the transportation supervisor should ensure that drivers understand the role of busing in promoting school desegregation and should assist them in handling discipline and other problems inherent in extended bus routes.

Planning for construction and use of school facilities is another responsibility of school business administrators for which discrimination is of concern. School facility planning has aggravated student separation, contributing to findings of discriminatory intent. The Supreme Court cautioned school officials to ensure that

"future school construction and abandonment are not used and do not serve to perpetuate or re-establish"[148] segregated school systems. Courts have examined facility construction and closure plans relative to effects on racial balance and have required boards to locate facilities between segregated residential areas of school districts. They have also used decisions to maintain double sessions and to locate portable buildings to relieve overcrowded conditions in one school while another is underused as proof of discrimination.

Local community control over desegregation policy and remedies is preferable to more complex and disruptive interdistrict solutions. The fact that interdistrict violations may have occurred does not necessarily require an interdistrict remedy. For example, in many of the cases reviewed, racially identifiable residential patterns alone were not sufficient to warrant interdistrict remedies, as school boards could not be held responsible for actions of other public and private agencies. "That there has been housing discrimination . . . is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage."[149]

Interdistrict remedies may be ordered when intentional segregative acts on the part of one district or public agency affect operations in another school unit, such as in the case of intentionally drawn district boundaries to separate racial groups. If school boards and other state and local officials act in concert with one another[150] to exacerbate interdistrict segregation, then courts may impose cross-district busing or the consolidation of school districts. The fact that population shifts, birth rates and other non-school factors also contribute to racial imbalances among districts may not relieve school districts and states from the burden to desegregate. The very recent Little Rock merger illustrates the appropriateness of interdistrict remedies when an arm of the state has contributed to segregation by purposeful, racially discriminatory use of zoning laws, placement of public housing projects and encouragement of practices of red lining home mortgages or steering home buyers to certain sections of metropolitan areas.[151]

Racially identifiable school districts which resist merger may be ordered to consolidate. The crucial test applied by courts is whether past actions of school boards and other agencies evidenced discriminatory intent and caused segregation between districts to persist. On the other hand, a voluntary merger of school systems, whether currently under court-ordered desegregation plans or not, would constitute official action toward greater desegregation. A federal court would find the overall racial composition of the consolidated system to be more favorable, and would probably not mandate busing throughout the new system. Without demonstration of segregative intent by the newly constituted board, and with positive actions to deliver education in a nondiscriminatory fashion, further litigation to compel assignment and busing of pupils would be unsuccessful.

In summary, to be consistent with federal law, differential treatment of minority students and employees must be based upon legitimate needs of school operations, and not upon race or ethnic origin. School officials should take all actions possible to alleviate racial imbalance regardless of the cause, rather than to inhibit changes in policy and practice that would counter student segregation.

School business administrators have opportunities to promote nondiscrimination as they plan program changes and interact with board members, other school personnel and community leaders. For example, they contribute to: the determination of student attendance zones and bus routes; the selection of sites for future school construction projects and buildings to be closed; the identification of pro-

jects for upgrading school plants in all areas of the district; the hiring and dismissal of employees; the development of guidelines for effective district and building operation; and the reorganization of grade levels and consolidation of schools and school districts. In each of these important responsibilities, school business administrators must consider the implications of policy and practice upon school efforts to eliminate segregation at the same time they strive to provide quality education for all students.

Notes

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3. Id. at 18.

4. Cuddy, "The Problem of Forced Busing and a Possible Solution," 66 *Phi Delta Kappan* (September, 1984), 55-56.

5. W. Garms, J. Guthrie & L. Pierce, *School Finance: The Economics and Politics of Public Education*, (1978), 27.

6. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

8. Id. at 557.

9. *Cumming v. Richmond County Board of Educ.*, 175 U.S. 528 (1899).

10. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

11. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

12. *University of Maryland v. Murray*, 169 Md. 478, 182 A. 590 (Md. Court of Appeals, 1935).

13. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

14. *Sweatt v. Painter*, 339 U.S. 629 (1950).

15. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950).

16. D.L., Kirp & M.G. Yudof, *Educational Policy and the Law: Cases and Materials* (1974), 291.

17. *Brown*, 347 U.S. at 495.

18. Id. at 495.

19. Kirp & Yudof, supra note 17, at 304.

20. *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955).

21. M.W. LaMorte, *School Law: Cases and Concepts* (1982) 289.

22. *United States v. Jefferson County Board of Educ.*, 372 F. 2d 836 (5th Cir. 1966).

23. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

24. Carter, A Reassessment of Brown v. Board in Shades of Brown: New Perspectives on School Desegregation (Bell ed. 1980), at 24.

25. *Cooper v. Aaron*, 358 U.S. 1 (1958).

26. *James v. Almond*, 170 F. Supp. 331 (D.C. Va. 1959).

27. *Goss v. Board of Educ. of Knoxville*, 373 U.S. 683 (1963).

28. *Clemons v. Board*, 356 U.S. 1006 (1956), and *Monroe v. Board of Commissioners, City of Jackson, Tennessee*, 390 U.S. 936 (1967).

29. *Harrison v. Day*, 106 S.E. 2d 636 (Supreme Court of Appeals, Va. 1959). *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), and *Pettaway v. County School Board of Surry County, Virginia*, 230 F. Supp. 480 (E.D. Va. 1964).

30. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964).

31. *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968).

32. Id. at 439.

33. *Alexander v. Holmes*, 396 U.S. 19,20 (1969).

34. Kirp & Yudof, supra note 17, at 353.

35. K. Alexander and M.D. Alexander, *American Public School Law* (2nd ed. 1985), 432.

36. *Franklin v. Barbour County Board of Educ.*, 259 F. Supp. 545 (M.D. Ala. 1966).

37. *Kelly v. Altheimer, Arkansas, Public School District No. 22*, 378 F. 2d 483 (8th Cir. 1967).

38. 42 U.S.C. 2000c(b).

39. 42 U.S.C. 2000c-6.

40. *Jefferson*, 372 F. 2d 836.

41. Id. at 886-87.

42. *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967).

43. *Smuck v. Hobson*, 408 F. 2d 175, 185 (D.C. Cir. 1969).

44. *Swann v. Charlotte-Mecklenburg Board of Educ.* 402 U.S. 1 (1971).

45. Id. at 16.

46. Id. at 30.

47. *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971).

48. *Swann*, 402 U.S. at 24. See also, *Spencer v. Kugler*, 326 F. Supp. 1235 (D.C. N.J. 1971), aff'd, 404 U.S. 1027 (1972), and *Morales v. Shannon*, 516 F. 2d 411 (5th Cir. 1975).

49. See, e.g., *Winston-Salem/Forsyth County Board of Educ. v. Scott*, 404 U.S. 1221 (1971), *United States v. Texas Educ. Agency*, 532 F. 2d 380 (5th Cir. 1976), and *Stout v. Jefferson County Board of Educ.* 537 F. 2d 800 (5th Cir. 1976).

50. See, *Wright v. Council of the City of Emporia*, 407 U.S. 451, 465 (1972), and discussion by Alexander & Alexander, supra note 36, at 432.

51. *Bell v. School City of Gary*, 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

52. *Deal v. Cincinnati Board of Educ.*, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

53. *Carter*, supra note 25, at 24.

54. *Jefferson*, 372 F. 2d at 886.

55. *Bell*, 324 F. 2d at 213.

56. *Deal*, 369 F. 2d at 63.

57. *United States v. School District 151 of Cook County, Illinois*, 404 F. 2d 1125, 1130 (7th Cir. 1968).

58. *Lee v. Nyquist*, 318 F. Supp. 710, (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971).

59. Id. at 720.

60. *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973).

61. The Court found similar discriminatory treatment with regard to the education of Hispanic and black students, and permitted the plaintiffs to combine minority groups to determine racial balance. See also, *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Texas 1970), and *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d 579 (9th Cir. 1973).

62. *Keyes v. School District No. 1, Denver*, 303 F. Supp. 279, 285; 303 F. Supp. 289 (D. Colo. 1969).

63. *Keyes*, 413 U.S. at 200.

64. *Morgan v. Kerrigan*, 523 F. 2d 917 (1st Cir. 1975).

65. Id. at 920.

66. *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 465 (1979).

67. "Federal Judge Closes Columbus, Ohio, Desegregation Case," *Education Week*, (May 15, 1985), 2.

68. *Dayton Board of Educ. v. Brinkman*, 443 U.S. 526 (1979).

69. Id. at 406 (1977).

70. *Brinkman v. Gilligan*, 446 F. Supp. 1232 (S.D. Ohio 1977).

71. *Brinkman*, 583 F. 2d 243, 252 (6th Cir. 1978).

72. *Dayton*, 443 U.S. 526.

73. *Diaz v. San Jose Unified School District*, 733 F. 2d 660 (9th Cir. 1984).

74. Id. at 675.

75. *Seattle School District No. 1 v. Washington*, 458 U.S. (1982).

76. *Seattle*, 473 F. Supp. 996, 1007 (W.D. Wash. 1979).

77. Id. at 1013.

78. *Seattle*, 458 U.S. at 479-80. See also, *Lee v. Nyquist*, 318 F. Supp. at 718.

79. *Higgins v. Board of Educ., of the City of Grand Rapids*, 508 F. 2d 779 (6th Cir. 1974).

80. *Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424 (1976).

81. *Spangler v. Pasadena City Board of Educ.*, 311 F. Supp. 501, 505 (C. D. Cal. 1970).

82. *Spangler*, 375 F. Supp. 1304 (C.D. Cal. 1974).

83. *Alexander v. Youngstown Board of Educ.*, 675 F. 2d 787 (6th Cir. 1982), and *Bell v. Board of Educ., Akron Public Schools*, 683 F. 2d 963 (6th Cir. 1982).

84. *Bell*, 683 F. 2d at 968.

85. *Crawford v. Board of Educ.*, 458 U.S. 527 (1982).

86. *Crawford v. Board of Educ.*, 170 Cal. Rptr. 495 (Cal. Ct. App. 1981).

87. *Crawford*, 458 U.S. at 539.

88. Id. at 537.

89. Id. at 562-63.

90. Doyle, "Way Out West in Dixie: The Los Angeles Desegregation of Schools," 20 *Integrateducation* (January-April, 1982), 2-6.

91. *United States v. Scotland Neck City Board of Educ.*, 407 U.S. 484 (1972).

92. *Scotland Neck*, 442 F. 2d 575, 583 (4th Cir. 1971).

93. *Swann*, 402 U.S. at 45.

94. *Scotland Neck*, 407 U.S. at 491.

95. *Wright*, 407 U.S. at 459.

96. Alexander & Alexander, supra note 36, at 439; see also, *Lee v. Macon Board of Educ.*, 448 F. 2d 746 (5th Cir. 1971).

97. *Jefferson*, 372 F. 2d 836.

98. *Spencer*, 326 F. Supp. at 1241.

99. *Bradley v. School Board of the City of Richmond*, 338 F. Supp. 67 (E.D. Va. 1972).

100. *Richmond*, 462 F. 2d 1058 (4th Cir. 1972), aff'd by an equally divided Court, 412 U.S. 92 (1973).

101. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

102. Id. at 747.

103. *Lee v. Lee County Board of Educ.*, 639 F. 2d 1243, 1260 (5th Cir. 1981).

104. *Andrews v. Moore*, 513 F. Supp. 375 (W.D. La. 1980).

105. *Andrews v. Moore*, 648 F. 2d 959, 969 (5th Cir. 1981).

106. *United States v. Board of School Commissioners of Indianapolis*, 573 F. 2d 400 (7th Cir. 1978).

107. *Indianapolis*, 368 F. Supp. 1191, 1193 (S.D. Ind. 1973).

108. *Indianapolis*, 503 F. 2d 68 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975).

109. *Indianapolis*, 419 F. Supp. 180 (S.D. Ind. 1975).

110. *Indianapolis*, 429 U.S. 1068 (1976).

111. *Indianapolis*, 573 F. 2d 400 (7th Cir. 1978), cert. denied, 439 U.S. 824 (1978).

112. *Indianapolis*, 506 F. Supp. 657, 663 (S.D. Ind. 1979).

113. *Goldsboro City Board of Educ. v. Wayne County Board of Educ.*, 745 F. 2d 324, 328 (4th Cir. 1984).

114. *Ross v. Houston Indep. School Dist.*, 699 F. 2d 218 (5th Cir. 1983).

115. Id. at 227.

116. W. Valente, *Law in the Schools* (1980), 312.

117. *United States v. Missouri*, 515 F. 2d 1365 (8th Cir. 1975).

118. See *Adams v. United States*, 620 F. 2d 1277 (8th Cir. 1980), *cert. denied*, 449 U.S. 826, 1980; and *Liddell v. Board of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980), aff'd, 667 F. 2d 643 (8th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).

119. *Liddell v. Board of Educ. of the City of St. Louis*, 567 F. Supp. 1037, 1052 (E.D. Mo. 1983).

120. *Newberg Area Council v. Board of Educ. of Jefferson County, Kentucky*, 510 F. 2d 1359 (6th Cir. 1974).

121. Id. at 1361.

122. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) and 416 F. Supp. 328 (D. Del. 1976), appeal of order dismissed, 423 U.S. 1080 (1976).

123. *Evans v. Buchanan*, 555 F. 2d 373, 380 (3rd Cir. 1977), cert. denied, 434 U.S. 880 (1977).

124. 20 U.S.C. 1701 (a).

125. *Cooper*, 358 U.S. 1.

126. *Aaron v. McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959).

127. *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 584 F. Supp. 328 (E. D. Ark. 1984).

128. Id. at 341.

129. *Hills v. Gautreaux*, 425 U.S. 284, 352 (1975).

130. Harris, "Desegregation Litigation in the Aftermath of Brown: Overcoming the Inertia of the Status Quo," in *Educators and the Law: Current Trends and Issues* ed. Thomas, Cambron-McCabe & McCarthy, (1983), 47.

131.42 U.S.C. 2000.

132. *Three Cities That Are Making Desegregation Work*, supra note 3, at 12.

133. See, e.g., Barnett, "Equity, Technology, and Educational Policy," 8 *The Urban League Review* (Summer 1984), 57-66.

134. Jones, "Statement by the Acting Secretary of Education on the Fiscal Year 1986 Budget," *United States Department of Education NEWS* (February 4, 1985).

135. See, e.g., *A Nation at Risk: The Imperative for Educational Reform*, National Commission on Excellence in Education (1983); and *Action for Excellence*, Task Force on Education for Economic Growth of the Education Commission of the States (1983).

136. "Images of Change: The 30 Years Since the Brown Decision," *Education Week* (June 6, 1984), 26.

137. "Reagan in Review: A Look at Federal Education Policy, 1980-84," *Education Daily*, (October 18, 1984), 5, 8.

138. Bell, "A Model Alternative Desegregation Plan" in *Shades of Brown: New Perspectives on School Desegregation*, ed. Bell, (1980).

139. Doyle, supra note 91, at 2.

140. "The Super School: Pressures on Public Education in the '80s," *Education Daily* (February 26, 1985), 8.

141. Valente, supra note 116, at 305.

142. *Evans*, 555 F. 2d at 380.

143. L. Peterson, R. Rossmiller & M. Volz, *The Law and Public School Operation* (1978), 392.

144. *Seattle*, 458 U.S. 457.

145. *Diaz*, 733 F. 2d 660.

146. See discussion of the important elements and costs of student transportation plans presented by L. Hughes, W. Gordon, & L. Hillman, *Desegregation America's Schools* (1980), 109-120.

147. Candoli, supra note 1, at 318.

148. *Swann*, 402 U.S. at 21.

149. *Bradley*, 462 F. 2d at 1066.

150. *Hills*, 425 U.S. at 352.

151. *Little Rock*, 584 F. Supp. 328.